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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006	R.06-10-005

COMMENTS OF THE UTILITY REFORM NETWORK ON PROPOSED DECISION

February 5, 2007

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Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure The Utility Reform Network ("TURN") submits these Comments on the Proposed Decision ("PD") of Commissioner Chong in the above-captioned proceeding.

I. INTRODUCTION

While the PD has proposed some major changes, as compared to the Order Instituting Investigation ("OIR"), in the regulatory scheme for implementing the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"), TURN still has several significant concerns. Among TURN's concerns with the OIR were the its failure to address enforcement of the critical DIVCA prohibitions on cross-subsidization and discrimination and enforcement of the build-out requirements. While the PD does a better job of addressing some of these issues, in comparison, the PD's treatment of enforcing the prohibition on cross-subsidization is effectively non-existent.

TURN is also very concerned with the PD's interpretation of the Commission's statutory authority and responsibilities, and the PD's position that the Commission's role in implementing DIVCA is primarily ministerial. This narrow interpretation is reflected in numerous instances, with the most significant being the rejection of any opportunity for parties to protest video applications; the limited access to "confidential" data; the limited role the PD sees for DRA particularly with regard to information access; and the PD's conclusion that it lacks authority to grant intervenor compensation in the "video services context." TURN will discuss these issues in our comments below.[1]

II. THE PD'S PROPOSALS FOR ENSURING NO CROSS-SUBSIDIZATION ARE INSUFFICIENT

In the case of the build-out and anti-discrimination requirements, the PD provides that

> The Commission will undertake significant monitoring for enforcement of the antidiscrimination and build-out requirements. Although the Commission will provide public reports regarding video and broadband services "on an aggregated basis," each state video franchise holder will report to the Commission the data underlying the public reports at a high level of disaggregation. On a confidential basis, the Commission's staff will study this disaggregated data closely, in order to determine and track the progress that each franchisee is making towards fulfilling its build-out requirements.[2]

TURN believes that the approach described above is better than that proposed in the OIR. The PD at least now provides for mandatory, detailed reporting followed by close examination of the data and tracking and monitoring. Yet, with regard to cross-subsidization, an issue that TURN submits is as important as the antidiscrimination and build-out requirements (and one that the Legislature thought important enough to include

[1] TURN's Proposed Corrections to Findings of Fact and Conclusions of Law is attached as Attachment 1.

[2] Proposed Decision of Commissioner Chong ("PD"), pp. 167-168.

in DIVCA), the PD inexplicably takes a much more sanguine approach. Rather than collecting highly detailed and disaggregated data and closely examining it, the PD relies primarily on the provisions of the Uniform Regulatory Framework ("URF") decision, D.06-08-030, and provisions in DIVCA that freeze basic residential rates for two years as an assurance that no cross-subsidization will occur.[3] What this approach fails to consider is that pursuant to DIVCA franchises are valid for ten years, yet the residential rate freeze expires on January 1, 2009. There is nothing in the PD to prevent the URF telephone companies from taking the costs associated with video build-outs and cross-subsidizing them by raising basic rates after January 1, 2009. If the Commission does not track the costs associated with video deployment now, it will have no baseline to assess cross-subsidization after the rate freeze is terminated.

The PD also appears to rely on the Federal Communications Commission's ("FCC") Part 64 regulations that require the accounting separation of telecommunications costs from the non-telecommunications costs for telecommunications utilities, such as Verizon, AT&T, and SureWest.[4] However, there is a significant issue associated with whether the FCC requires compliance with Part 64 for its reporting practices. For example, DSL service is an information service. Information services are unregulated, thus the portion of investments in plant associated with DSL should be allocated, under Part 64, to the unregulated side. However, in its September 2005 "Wireline Broadband Order", (FCC 05-150), the FCC states:

> "In this Order, we allow the non-common carrier provision of wireline broadband Internet access transmission that we previously have treated as regulated,

[3] PD, p. 177.
[4] PD, p. 175.

> interstate special access service, but we do not preemptively deregulate any service currently regulated by any state. Therefore, as specified in section 32.23 of our rules, the provision of this transmission is to be classified as a regulated activity under part 64 "until such time as the Commission decides otherwise." We do not "decide otherwise" at this time because we find that the costs of changing the federal accounting classification of the costs underlying this transmission would outweigh any potential benefits and that section 254(k) of the Act does not mandate such a change.[5]

This was a rather significant action on the part of the FCC, essentially arguing that the 254(k) provisions (i.e. the ban on cross-subsidization in the Communications Act) could be satisfied even though the new investments in the "competitive" and unregulated DSL service would remain on the regulated books of account for the Incumbent Local Exchange Companies ("ILECs").

Further, as TURN discussed in our Comments on the OIR[6] and was dismissed by the PD, the carriers may not be complying with the Part 64 rules. How AT&T can roll out significant amounts of extra fiber, and not increase its reported unregulated investments, in light of its widely publicized efforts to deploy video services, should be of great concern to this Commission, especially in light of the URF framework. The effect of Part 64 not being enforced in a reasonable fashion by the FCC, combined with carriers not complying with Part 64 on a consistent basis, should not leave the Commission with a feeling of comfort regarding potential cross-subsidization, but rather just the opposite. Thus, the Commission should do more then the meager proposals in the PD. Cable and Wire Facilities ("C&WF") are the 800 pound gorilla when it comes to cost allocation and the potential for cross subsidy. Portions of the same C&WF that are

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[5] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, CC Docket No. 02-33, Report and Order FCC 05-150 (Sept. 23, 2005), para. 130.

[6] See Comments of The Utility Reform Network (Oct. 25, 2006), pp. 10-12 (TURN Comments).

used to provide basic voice are now also associated with DSL and video. However, Part 64 with regard to C&WF is stuck at a 25% allocator for the interstate jurisdiction. According to the FCC's 1986 Joint Cost Order, states are free to change allocation for intrastate ratemaking purposes.[7] It would be entirely reasonable for the Commission to develop its own allocation approach as a means of pursuing just and reasonable rates for telephone services, and thus helping to prevent cross subsidy between video and telephone service. At a minimum, the Commission should address this allocation issue when evaluating such issues as rate increases associated with local service, or whether it will be reasonable to implement a new rate freeze, or other cross-subsidy protection mechanism, following the expiration of the URF rate freeze.[8]

The PD also relies on the Commission's tariff-review authority to assuage concerns about cross-subsidization, stating that "Tariffing entails special Commission reviews, which give us the opportunity to reject or suspend any price increases that lead to cross subsidization."[9] The PD goes on to talk about the advice letter process stating, "The Commission need only reject the advice letter if it determines a proposed rate increase will result in unlawful cross-subsidization. Alternatively, if need be, the Commission may rescind any non-complying tariff that goes into effect." What the PD fails to mention, however, is that D.06-08-030 allows the carriers to file advice letters on one day's notice, which is insufficient time for the Commission the engage in a fact-based analysis of cross-subsidization, especially with no data on costs. The PD also fails

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[7] *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298 (1986).

[8] TURN urges the Commission to reconsider the recommendations made in the TURN Comments at pp. 13-16 for assessing and monitoring cross-subsidization.

[9] PD, p. 176.

to account for the fact that while detariffing has not yet occurred, the Commission has clearly stated its intent to eliminate tariffing.[10]

So, while the PD states "we remain vigilant in our efforts" to ensure no cross-subsidization, no matter how strong or well-meaning that intent, there is nothing to support the necessary follow-through if that intent is to become action. As the PD chastises "Our enforcement will be based on what applicants do, not their initial intentions." But how is the Commission to assess carrier actions without collecting and analyzing any data? Similarly, the PD provides that not only may the Commission instigate an investigation into cross-subsidization, but that "local governments or individual consumers, among others, may also bring cross-subsidization complaints to the Commission." How is this anything other than a meaningless promise or, even worse, an attempt to meet the statute's requirement with a promise for future action that the Commission has reason to know it could never meet, given that the PD would leave parties without any access to information that could substantiate such a complaint?

III. THE PD'S INTERPRETATION OF THE COMMISSION'S STATUTORY AUTHORITY AND RESPONSIBILITIES UNDER DIVCA IS OVERLY NARROW

In most cases, the PD takes the narrowest view possible in interpreting the Commission's statutory authority and responsibilities under DIVCA. As part of that interpretation the PD finds the Commission's role is primarily ministerial (although that term is never used in DIVCA). Based on this narrow interpretation, the PD provides that there is no role for protests of video applications; limits access to "confidential" data;

[10] See for example D.06-08-030 FOF 77 ("We can rely upon market forces, rather than regulatory proceedings concerning tariffing and contracting practices…) and COL 34 ("There is no public interest in maintaining outmoded tariffing procedures that require review of cost data and delay service provision to customers and this practice should end.").

limits the role of the Division of Ratepayer Advocates ("DRA"); and finds that the Commission lacks authority to grant intervenor compensation in the "video services context."

In each of these cases there is no clear, absolute language in DIVCA that would lead to the result proposed in the PD. Rather, all these areas are subject to interpretation by the Commission and the PD has chosen the most restrictive interpretation possible. Unfortunately, in each case, the PD's interpretation has the direct result of eliminating meaningful participation by consumers and consumer representatives.

Further, the PD's interpretation completely ignores the Legislature's mandate in DIVCA where, in Sec. 5810(a)(2)(G) it provides that one of the principles underlying the legislation was to "Maintain all existing authority of the California Public Utilities Commission as established in state and federal statutes." Thus, unless specifically rejected in DIVCA, TURN submits that the Commission has ample authority to permit many if not all the typical processes available in Commission proceedings, albeit with certain accommodations to meet specific statutory parameters. Thus, for example, the PD hides behind the fact that DIVCA mandates a proscribed time frame for reviewing and issuing applications. Yet it is certainly within the Commission's existing authority to create a truncated protest process that would be capable of meeting the DIVCA time table and still provide meaningful participation by interested and affected parties. Receiving a statewide video franchise represents an enormous business opportunity for franchisees, yet the PD envisions granting these wealth-creating opportunities with little review and oversight to verify whether the public benefits of state-wide franchise authority are accruing to all Californians. That is not what the Legislature intended by passing DIVCA.

In spite of the narrow reading of its authority and responsibilities, the PD, in certain situations, finds that the Commission has broader authority with respect to issues that the PD deems worthy of such expansion. For example, with reference to labor reporting requirements, the PD states, "While submission of this information is outside of the scope of the tightly prescribed application process, we find that this reporting requirement is necessary for ongoing enforcement of DIVCA labor provisions."[11] Similarly, the PD finds that it has authority to "impose additional reporting requirements," noting that "We, like DRA, find that 'it is necessary that the Commission be able to obtain information above and beyond that which is specifically enumerated in [DIVCA] in order to fulfill its statutory duties under' the Act."[12] While TURN supports these conclusions, they demonstrate that the Commission is not as hamstrung by DIVCA as the PD finds in most other areas.

In other cases, the PD, not even attempting to rely on DIVCA or statutory interpretation, curtails access to information by either declaring that such data is confidential or creating barriers to the accessibility of such information. For example, the PD declares that disaggregated broadband and video services data will be deemed confidential and released "only if we determine that the disclosure of the data is made as provided for pursuant to Section 583."[13] While TURN appreciates the need for confidentiality of "competitively sensitive" data, non-market participants such as TURN have almost always had access to such information so long as an appropriate non-disclosure agreement has been executed. In D.06-06-066, the Commission extolled the

[11] PD, p. 60.
[12] PD, p. 144.
[13] PD, p. 138.

work of intervenor groups such as TURN, and found that there is "no basis to restrict non-market participants to receiving only aggregated or redacted information…as long as they agree to a protective order or confidentiality agreement where there is a need to protect the data"[14] While that case dealt with electric procurement, the principal applies here as well.

In a similar vein, the PD restricts DRA access to data the Commission will be collecting in due course forcing DRA to send a letter to the Commission's Executive Director asking access for a particular report.[15] Forcing consumer representatives, whether DRA, TURN, or any other such party to jump through hoops to receive access to information totally ignores standard, time-honored Commission practice and exerts a chilling effect upon these groups' participation. As the Commission held in D.06-06-066,

> We therefore reject AReM/CNEs' premise that Commission-only or government-agency-only analysis of ESP (or other) data is better than examination by government plus outside non-market groups. Part of what gives our processes legitimacy is participation from outside groups in our decision making process. With their participation, we consider diverse viewpoints, examine concerns, and develop a fuller record in support of our decisions.[16]

IV. THE PD COMMITS LEGAL ERROR IN DETERMINING THAT THE COMMISSION LACKS STATUTORY AUTHORITY TO GRANT INTERVENOR COMPENSATION "IN THE VIDEO SERVICES CONTEXT"

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[14] D.06-06-066, Interim Opinion Implementing Senate Bill No. 1488 Relating to Confidentiality of Electric Procurement Data Submitted to the Commission in R.05-06-04 (June 29, 2006), p. 58-59.

[15] Amazingly, while the PD prides itself with adhering to the specific language of the legislation, the PD completely ignores the requirement of Sec. 5900(k) which states that DRA "shall have access to any information in possession of the commission…"

[16] D.06-06-066, p. 58.

The PD would have the Commission determine that it lacks authority to grant intervenor compensation to otherwise eligible intervenors participating in Commission proceedings "concerning DIVCA." While the only Conclusion of Law on point merely states that "DIVCA does not permit the Commission to order a grant of intervenor compensation,"[17] the discussion section suggests that the DIVCA provisions must be read together with the intervenor compensation statute to support such a conclusion. To the contrary, reading the relevant statutory sections demonstrates only that the Commission would commit legal error if it creates such a broad prohibition on intervenor compensation for participation in a Commission proceeding.

The intervenor compensation statute is very clear on this point. Section 1801 describes the article's purpose as "provid[ing] compensation for [fees and costs] to public utility customers of participation or intervention in <u>any</u> proceeding of the commission." [emphasis added] And Section 1803 is mandatory: "The commission <u>shall</u> award [reasonable fees and costs] of preparation for and participation in a hearing or proceeding" if the customer complies with Section 1804, demonstrates a substantial contribution to the Commission's order or decision, and meets the "significant financial hardship" standard. [emphasis added] And Section 1802(f) defines "proceeding" in a manner that refers only to the matter being the subject of a formal proceeding before the Commission, without any mention of whether the subject of that proceeding is a public utility for purposes of the statute.[18] Thus, the statutory language most relevant to

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[17] PD Conclusion of Law 132.

[18] The Commission has awarded intervenor compensation to public utility customers for their work in proceedings where public utility service was not directly at issue, such as the rulemaking on intervenor compensation (D.00-02-044, issued in R.97-01-009/I.97-01-010) and the rulemaking on revising General Order 96 (D.05-05-007, issued in R.98-07-038).

eligibility focuses on whether the Commission is engaged in a formal proceeding, rather than whether a regulated utility is involved in the proceeding, contrary to the PD.[19]

Nothing in DIVCA directs a different outcome on this subject. It's true that the definition of a video service provider in Section 5840(a) prohibits the Commission from imposing "any requirement on any holder of a state franchise except as expressly provided in this division." It is also irrelevant, since the intervenor compensation requirement is imposed by statute, not by the Commission. The Legislature could have, but did not, include the intervenor compensation statutes in the list of statutes specified in that section to not apply to holders of a state franchise. The reasonable conclusion is that the statutes omitted from that list do apply. Further damage to the PD's attempt to blame DIVCA for this outcome is done by Section 5810(a)(2)(G), which sets out the principle that the legislation should "maintain all existing authority of the [Commission] as established in state and federal statute."

The PD's suggestion that DIVCA "does not permit" intervenor compensation suggests that the legislature intended to eliminate intervenor compensation even as it excluded the associated statutes from the list of those that do not apply to holders of a state franchise, and explicitly maintained all other statutory authority. The far more logical and only legally defensible reading is 1) DIVCA does not address, much less prohibit, the granting of intervenor compensation, and 2) the intervenor compensation statutes direct an award of compensation if the participation occurs in a "proceeding" and the other eligibility requirements are met.

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[19] "Like Verizon, we find that these statutes limit the intervenor compensation program to proceedings involving utilities." PD, p. 197 [emphasis added].

Given that the Commission just revised its approach to funding awards under such circumstances, the uncertainty surrounding who would pay an award of intervenor compensation in a video franchise application proceeding may be a matter of frustration for an agency. It does not, however, have any bearing on the question of whether an award is permitted under DIVCA or the intervenor compensation statutes. The PD cites with favor Verizon's reference to Section 1807 in support of the argument that intervenor compensation is available only when it is a "proceeding involving utilities."[20] But the language here merely addresses the payment obligation that arises where the subject of the hearing, investigation or proceeding is a public utility. It would stretch that language beyond the breaking point to interpret it as somehow directing that "proceedings" must be limited to those "involving utilities" when the definition of "proceedings" set forth a few sections prior does not include any such limitation. At most, Section 1807 suggests the Commission may need to rely upon the Intervenor Compensation Fund where the DIVCA-related application or proceeding does not involve a regulated utility.

In summary, there is nothing in DIVCA or the intervenor compensation statutes that suggests the Commission lacks the discretion to award intervenor compensation where an eligible intervenor can demonstrate its substantial contribution to a decision issued on a DIVCA application. The PD seems to agree that the DIVCA applications will raise issues of critical concern to the broad public. Therefore, one would think, public participation should be encouraged. In fact, the Commission just reaffirmed the

[20] PD, p. 197.

important role of the intervenor compensation program "to ensure that the Commission has a wide range of customer perspectives for its consideration in reaching a decision."[21]

V. CONCLUSION

The PD represents an improvement over the proposals presented in the OIR. However, the PD provides no comfort whatsoever that the Commission will establish processes to enable it to enforce the prohibition on cross-subsidization. Further, the PD goes out of its way to limit participation of the very citizens that DIVCA was created to benefit. TURN respectfully urges the Commission to implement the modifications proposed above so the vision of DICVA can be realized.

February 5, 2007

Respectfully submitted,

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[21] Joint Commissioner and Administrative Law Judge's Ruling Affirming Denial of Eligibility in R.06-05-028, 1/29/07, p. 3, citing Re Commission's Intervenor Compensation program, 79 CPUC 2d 628 (D98-04-059).

Attachment 1

TURN's Proposed Corrections to the Findings of Fact and Conclusions of Law

Findings of Fact

24. The Commission will receive deployment data at a high level of granularity through reports that a franchisee must submit. This data is subject to confidentiality protections consistent with Public Utilities Code § 583, with the exception that non-market participants can have access to such data so long as an appropriate non-disclosure agreement has been executed.

45. Monitoring the actions of a franchisee through the Commission's reporting requirements will enable the Commission to determine whether a franchisee is complying with the statute's build-out ~~and~~ anti-discrimination and cross-subsidization requirements and to take appropriate enforcement steps if it is not complying.

67. Since DIVCA maintains all existing authority of the California Public Utilities Commission as established in state and federal statutes ~~envisions only a ministerial role for the Commission in the review of an application for a video franchise does~~ it is ~~not~~ reasonable to permit protests of the application, although on a truncated basis to comply with DIVCA deadlines.

68. It would ~~not~~ be feasible to entertain protests, responses to protests, and Commission action to resolve the protests and still comply with ~~during~~ the short period set by statute for the review of an application for a video franchise.

100. It is reasonable to release annual broadband and video data only if the Commission determines that such a disclosure of the data will be made only "as provided for pursuant to Section 583", with the exception that non-market

participants can have access to such data so long as an appropriate non-disclosure agreement has been executed.

129. It is reasonable for the Commission to undertake significant monitoring for the enforcement of the anti-discrimination, ~~and~~ build-out and cross-subsidization requirements as discussed herein.

136. Although the Commission has remained vigilant in enforcing existing prohibitions on unlawful cross-subsidization of intrastate telecommunications services, additional monitoring is required to assure that video services deployment are not cross-subsidized by basic rates, especially after January 1. 2009.

137. The freezing of basic residential rates adopted in Public Utilities Code § 5950 ensures that there is no opportunity for basic residential rates to be increased to support video service operations during the period of the freeze, but does not adequately protect consumers after the rate freeze given that video franchises are granted for ten year terms.

138. The Commission shall implement data collection, monitoring and auditing of all costs associated with the deployment of video services by franchisees that also provide, or intend to provide basic residential telephone services ~~has reasonable requirements in place~~ to prevent unlawful cross-subsidization of video services ~~as discussed herein~~.

139. ~~The procedures discussed herein for investigation and sanctioning of the unlawful cross-subsidization of video services are reasonable.~~

145. DRA shall be entitled access to the same information that is filed with the Commission by franchise applicants and franchisees. ~~The procedures adopted herein whereby DRA shall request reports from the Executive Director of the Commission are reasonable.~~

Conclusions of Law

48. While Public Utilities Code § 5840 does not explicitly provide for protests, it is within the Commission's discretion and authority to permit protests on a truncated schedule so long as the deadlines of DIVCA are met.

53. ~~There is no statutory basis for TURN's assertion that DRA has a right to protest an application for a video franchise.~~

54. ~~TURN and Joint Cities misconstrue DIVCA when they assert that Public Utilities Code § 5840(e)(1)(D) permits local entities to file protests. It only requires that local entities receive a copy of the application for a state franchise.~~

79. Pursuant to Pursuant to Public Utilities Code § 5960(d), annual broadband and video data reported to the Commission shall be disclosed to the public only as provided for pursuant to Public Utilities Code § 583, except that non-market participants can have access to such data so long as an appropriate non-disclosure agreement has been executed.

120. Current federal and state law subject California telecommunications companies to a variety of measures designed to prevent unlawful cross-subsidization between telecommunications costs and non-telecommunications costs. The Commission has ample authority to require video franchisees that also provide, or intend to provide basic residential telephone services to submit data reflecting all costs associated with the deployment of video services and the Commission shall collect, monitor and audit that data to prevent unlawful cross-subsidization between telecommunications costs and non-telecommunications costs.

131. The procedures adopted herein whereby DRA shall be entitled access to the same information that is filed with the Commission by franchise applicants and franchisees ~~request reports from the Executive Director of the Commission~~ are consistent with DIVCA.

132. There is nothing in DIVCA to preclude ~~does not permit~~ the Commission ~~to~~ from ordering a grant of intervenor compensation.

CERTIFICATE OF SERVICE

I, Cory Oberdorfer, certify under penalty of perjury under the laws of the State of California that the following is true and correct:

I served the attached:

COMMENTS OF THE UTILITY REFORM NETWORK ON PROPOSED DECISION

by sending said document by electronic mail to each of the parties on the attached Service List **R.06-10-005**.

Executed this February 5, 2007, in San Francisco, California.

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CALIFORNIA PUBLIC UTILITIES COMMISSION
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